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No. 05-1382

In The
Supreme Court of the United States

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Petitioner,

ACB (LP)

)OD
A, et al.,

Respondents.

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To T... United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OUT OF TIME AND BRIEF OF THE CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS AND THE CATHOLIC MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OUT OF TIME AND BRIEF *AMICI CURIAE*

The Christian Medical and Dental Associations and the Catholic Medical Association move for leave to file the attached *amici curiae* brief, notwithstanding that the time for filing such briefs expired on Thursday, August 3, 2006. This extension is justified by the fact that counsel for *amici curiae* was hospitalized on an emergency basis on the morning of August 1, 2006.

Counsel for *amici curiae* has pursued the preparation of this brief with diligence. Counsel for the parties have been served electronically on August 8, 2006 to minimize delay in providing them access to the arguments asserted in the brief. The parties have consented to the filing of this brief.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae The Christian Medical & Dental Associations were founded in 1931 and today represents over 17,000 members – primarily practicing physicians representing the entire range of medical specialties. This organizations view principles of biblical faith as essential to protecting the lives and best interests of patients, the conscientious practice of medicine according to long-standing Hippocratic and religious principles, and to preserving the public respect accorded to physicians as guardians of health and life.

Amicus Curiae Catholic Medical Association is an association of physicians who agree with the United States Conference of Catholic Bishops in their observation that:

> Modern medicine has brought us face-to-face with the continuum of human life from conception onwards, and the inescapable reality of human life in the womb. Yet our legal system, and thus our national culture, is being pressed to declare that human life has no inherent worth, that the value of human life can be assigned by the powerful and that the protection of the vulnerable is subject to the arbitrary choice of others. The lives of all who are marginalized by our society are endangered by such a trend.[2]

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[1] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amici* or its counsel has contributed money or services to the preparation or submission of this brief.

[2] Nat'l Conference of Catholic Bishops, *Abortion and the Supreme Court* (Nov. 15, 2000).

The practice of partial-birth abortion further advances this perilous trend and is never medically necessary.

SUMMARY OF ARGUMENT

Respondents as non-physicians are not subject to any penalty under the Partial-Birth Abortion Act of 2003 ("Act"), and therefore have not presented an actual case or controversy for adjudication. The advisory opinions rendered below exceed the Article III jurisdiction of those courts, expanding this Court's jurisprudence of associational and third party standing beyond any possible limitation. Moreover, notwithstanding the plain language of the Act which limits its reach to physicians, the record fails to establish any imminent or actual injury suffered by Respondents permitting them to seek review of the Act. Absent standing, the Respondents may not assert standing on behalf of women who may seek abortions beyond the first trimester of their pregnancies.

In the event this Court determines that Respondents have established standing to challenge the Act, the district court erred in finding that the Act imposed an undue burden on the right of women to obtain an abortion since only a tiny fraction of the relevant group of women seeking abortions will obtain D & X abortions contrary to the provisions of the Act.

ARGUMENT

I. RESPONDENTS HAVE NO STANDING BECAUSE THE ACT DOES NOT APPLY TO NON-PHYSICIANS.

Courts have a "deeply rooted" commitment "not to pass on questions of constitutionality" unless adjudication of the constitutional issue is necessary, *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944). In every federal case, the party bringing suit must establish standing to prosecute the action. The importance of vigilantly enforcing the standing requirements is well described in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464 (1982).

> The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch. While the exercise of that "ultimate and supreme function," *Chicago & Grand Trunk R. Co. v. Wellman, supra,* at 345, 12 S.Ct., at 402, is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role. While the propriety of such action by a federal court has been recognized since *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803), it has been recognized as a tool of last resort on the part of the federal judiciary throughout its nearly 200 years of existence:
>
> > "[R]epeated and essentially head-on confrontations between the life-tenured

Constitutional government raised by this case require that this Court exercise the "passive virtue"[3] of rejecting this case for a lack of Article III standing. Such a rejection does not leave the Act beyond judicial review as evidenced by *Gonzales v. Carhart*, No. 05-380 presently pending before this Court. The judgment of the lower courts should be reversed, and this case dismissed.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 463 (1945).

In the instant case, none of the Respondents are subject to penalty under the Act, which by its terms applies only to the conduct of physicians. See 18 U.S.C. § 1531(a). Neither the original plaintiffs, Planned Parenthood Federation of America and Planned Parenthood Golden Gate, nor intervenor, the City and County of San Francisco, are physicians as defined by the Act.

> [T]he term "physician" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the

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[3] See Alexander M. Bickel, THE LEAST DANGEROUS BRANCH 111-98 (1962).

> doctor performs such activity, or any other individual legally authorized by the State to perform abortion: *Provided, however,* That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

18 U.S.C. § 1531(b)(2). Only physicians are permitted to perform surgical abortions under California law (Cal. Bus. & Prof. Code § 2253(b)(1)), and only natural persons are eligible to be physicians in California. Cal. Bus. & Prof. Code § 2032. *See also Lathrop v. Healthcare Partners Medical Group*, 8 Cal. Rptr. 3d. 668, 673 (1st Dist. 2004).

"It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). The record below fails to establish the standing of any of the Respondents to challenge the Act. Planned Parenthood Federation of America ("PPFA") does not provide any medical services. *See* Tr. 130-31 (Craig). Planned Parenthood Golden Gate ("PPGG") alleged it "employs and/or contracts with physicians who perform second-trimester abortion procedures that may fall within the proscriptions of the Act, including D&E abortions." (ER at 11:21-22). However, according to the most recent IRS Form 990 available for PPGG, the clinic employs only "contract physicians." Planned Parenthood Golden Gate, IRS Form 990 (2004), at 37 (available at http://www.guidestar.org/FinDocuments/2005/946/138/2005-946138828-022cbd02-9.pdf). The City and County of San Francisco ("San Francisco") made no allegations regarding any legal relationships to physicians who perform abortions. The only allegation

made regarding abortion was that "San Francisco General Hospital Women's Options Center ("Center") provides second-trimester abortions and accepts patients regardless of the ability to pay." *Planned Parenthood Federation of America, et al. v. Ashcroft, Complaint in Intervention* 2003 WL 23109226 ¶7 (N.D. Cal. 2003). This allegation, however, is not sufficient to create standing to challenge the Act, since the Center *qua* Center does not perform abortions, nor does it employ the physicians who perform the abortions. *See* Tr. 277 (Drey) (listing head nurse, counselor, and research assistance as employees). Abortions are performed by the faculty and students of the University of California San Francisco Medical School, who provide their services pursuant to a contract with the Public Health Department of San Francisco. *Report of the 2001-2002 San Francisco Civil Grand Jury, San Francisco General Hospital* at 4 (Sup. Ct. Cal., 2002) ("SFGH is staffed with physicians from UCSF [University of California San Francisco]. In return, SFGH provides research opportunities and facilities to UCSF physicians/researchers at the SFGH campus.") available at http://www.sfgov.org/site/uploadedfiles/courts/SFGHreport(3).pdf (last viewed August 2, 2006). There is no evidence in the record of any direct involvement of San Francisco in the performance of abortions.

Neither the original plaintiffs, nor San Francisco are subject to any penalty under the Act, yet they demand this Court invalidate the Congressional ban of what even defenders characterize as a "gruesome" procedure. *See Stenberg v. Carhart*, 530 U.S. 914 at 946 (2000) (Stevens, J. concurring). Respondents are simply no more than "concerned bystanders" seeking "a vehicle for the vindication of [their] value interests." *Cf. Valley Forge Christian College v. Americans United for Separation of Church and*

State, Inc., 454 U.S. 464, 473 (1982). The judgment of the lower courts should be reversed, and the case dismissed because the Respondents lack standing.

II. RESPONDENTS HAVE FAILED TO SHOW A THREAT OF "ACTUAL OR IMMINENT" INJURY.

The "irreducible constitutional minimum of standing contains three elements": (1) A concrete injury (2) that is traceable to the defendant's conduct and (3) that will be redressed by a court order. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff's injury must be "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical"'." *Id.* at 560-61 (citations omitted). Respondents have failed to make the necessary showing of any concrete injury from the Act. Rather the record reveals that their case is merely "conjectural" or "hypothetical."

The chain of contingencies that must occur before a concrete injury will be suffered by any of the Respondents include: 1) a woman must become pregnant, 2) allow the pregnancy to progress beyond the first trimester, 3) decide to terminate the pregnancy, 4) seek the assistance of a physician associated with one of the Respondents in terminating the pregnancy, 5) either be unaware of or reject the opportunity to have fetal demise induced prior to removal of the fētus, 6) be provided a partial-birth abortion as defined in the Act, 7) have a United States Attorney seek to impose criminal liability on one of the Respondents, notwithstanding the clear language of the Act limiting its applicability to "physicians" or those individuals "who nevertheless directly performs a partial-birth abortion." *See* 18 U.S.C. § 1531(b)(2).

The average American woman will experience 3.2 pregnancies in her lifetime.[4] These pregnancies will result in 2.1 live births, and 0.7 induced abortions on average.[5] Stillbirths and miscarriages comprise the balance of these experiences.[6] The vast majority of women who seek abortions will terminate their pregnancies in the first trimester using procedures not at issue in this litigation. *Planned Parenthood Federation of America v. Ashcroft*, 320 F.Supp. 2d 957, 960 (2004). Of the approximately fifteen percent who decide to terminate their pregnancies after the first trimester (*id.*), some will request that their physicians induce fetal demise before the abortion, and thus their physicians' actions will clearly be excluded from the terms of the Act. 320 F.Supp. 2d 957, 962 and 995-97. Of the women who choose to terminate their pregnancies after the first trimester without fetal demise being induced prior to removal of the fetus by induction or D&E, some will choose to use the services of physicians not associated with the Respondents. Of the remaining women who choose to terminate their pregnancies after the first trimester without fetal demise having been induced prior to removal of the fetus using the services of a physician associated with the Respondents, the abortion would have to be performed in a manner that would violate the Act. Finally, the U.S. Attorney would have to bring suit and

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[4] Stephanie J. Ventura et al., *Estimated Pregnancy for the United States, 1990-2000: An Update*, 52 Nat'l Vital Stat. Rpts. No. 23 at 8 (June 15, 2004) at http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_23.pdf.

[5] *Id.*

[6] Stephanie J. Ventura et al., *Highlights of Trends in Pregnancies and Pregnancy Rates by Outcome: Estimates for the United States, 1976-96*, 47 Nat'l Vital Stat. Rpts. No. 29 at 3 (Dec. 15, 1999) at http://www.cdc.gov/nchs/data/nvsr/nvsr47/nvs47_29.pdf.

persuade the courts that the Act applies to one of the Respondents as non-physicians under some creative theory of liability.

This outline of the requisite chain of events makes clear the speculative nature of the Respondents' injury. This deficiency is not cured by Respondents' inclusion of claims on behalf of their patients in light of the exemption of patients from any claims of conspiracy under the Act. See 18 U.S.C. § 1531(e).This chain of speculative occurrences is much too weak to support Respondents' standing for Article III purposes.

III. RESPONDENTS MAY NOT ASSERT THE RIGHTS OF PHYSICIANS SINCE DOCTORS ARE NOT HINDERED FROM ASSERTING THEIR LEGAL RIGHTS.

As a general rule, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. at 499. However, others may litigate the rights of third parties in those rare cases where the original party has standing, and there is a close relationship between the party asserting the right and the party possessing the right, plus the party possessing the right is hindered from protecting his own interests. *Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564, 576 (2004) (rejecting third-party standing of attorneys on behalf of prospective clients).

Inherent in Respondents' challenge is a dangerous expansion of the law governing standing to assert facial challenges. Abortion jurisprudence reveals cases of physicians, either alone or in conjunction with others (including

clinics), asserting the rights of doctors and their patients. *E.g., Doe v. Bolton*, 410 U.S. 173, 188 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976); *Singleton v. Wulff*, 428 U.S. 106, 109 (1973); *Colautti v. Franklin*, 439 U.S. 379, 383 n. 3 (1979); *Bellotti v. Baird*, 443 U.S. 622, 626 (1979); *Williams v. Zbaraz*, 448 U.S. 358, 361 (1980); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 440 n. 30 (1983); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 478 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Webster v. Reproductive Health Services*, 492 U.S. 490, 502 (1989); *Hodgson v. Minnesota*, 497 U.S. 417, 429 (1990); *Rust v. Sullivan*, 500 U.S. 173, 181 (1991); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845 (1992) (plurality); *Lambert v. Wicklund*, 520 U.S. 292, 294 (1997); *Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (per curiam); and *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

This Court has also recognized the standing of abortion clinics alone to bring cases vindicating the rights of the clinic *qua* clinic. *See, e.g., Madsen v. Women's Health Center*, 512 U.S. 753, 757 (1994) (conflict between abortion protesters and clinic operators).

However, what does not exist, and cannot exist under the case or controversy requirement of Article III of the Constitution, is a case where organizations have successfully sought review of a federal statute that by its terms can not be applied to them. To accept Respondents' position is to *sub silencio* reverse the centuries of this Court's jurisprudence barring advisory opinions – something which this Court has refused to do since the founding of the nation. See *Vieth v. Jubelirer*, 541 U.S. 267, 302 (2004).

IV. OVERBREADTH ANALYSIS SHOULD NOT BE APPLIED TO THE ACT.

Facial challenges to the constitutionality of statutes are generally disfavored, and the claim that statutes are constitutionally overboard is available in very few circumstances.

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances* exists under which the Act would be valid. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987) (emphasis added). This "no set of circumstances" test (*Salerno* test) is the test that is generally applied to any facial challenge to the constitutionality of a statute.

In *Rust v. Sullivan*, 500 U.S. 173 (1991) the Court applied the *Salerno* test to determine the constitutionality of federal regulations regarding abortion. Recipients of family planning funds under Title X sued the Department of Health and Human Services (HHS), claiming that the prohibition contained in Title X for use of funds for projects engaged in abortion counseling, referral, and activities advocating abortion as a method of family planning was unconstitutional. *Id.* at 181. In rejecting the challenge, this Court held that the recipients had not shown that there were no circumstances under which the statute could be applied constitutionally. Therefore they had failed

to overcome the burdens of a facial challenge to a legislative Act as defined in *Salerno*. *Id.* at 183, 203. As in *Rust*, Respondents have not met the burden established by *Salerno*.

Attempting to evade this stringent standard, Respondents seek to invoke the overbreadth doctrine as a means of challenging the Act. The overbreadth doctrine has been largely limited to First Amendment challenges because of the unique role free speech plays in preserving our constitutional system of government. *See e.g. New York Times Co. v. United States*, 403 U.S. 713 (1971) and Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-27 (1948).

Abortion, particularly the procedure known as partial-birth or D & X abortion, plays no similar role in preserving the constitutional order and warrants no special solicitude by this Court. The application of overbreadth analysis to abortion regulation has been expressly rejected by this Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) and *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). *But see Sabri v. U.S.*, 541 U.S. 600, 610 (2004) (dicta characterizing *Stenberg v. Carhart*, 530 U.S. 914 (2000) as applying the overbreadth doctrine).

Overbreadth analysis is also foreclosed because the Act contains criminal sanctions. "[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad." *Schall v. Martin*, 467 U.S. 253, 268, n. 18 (1984) (detaining juveniles under the New York Family Court Act was found to not be a violation of the due process clause).

V. THE ACT DOES NOT IMPOSE AN UNDUE BURDEN ON RESPONDENTS OR THEIR PATIENTS.

Guided by the standard articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 303 (1992), the lower court found that the Act imposed "an undue burden on women's right to choose a previability abortion." *Planned Parenthood Federation v. Gonzales*, 435 F.3d 1163, 1176 (2006). However, proper application of the *Casey* standard supports the constitutionality of the Act. In *Casey,* Pennsylvania had erred in defining the breadth of the class that was covered under the Omnibus Abortion Control Act at issue. The state defined the affected class as those women seeking abortions and presented evidence that only one percent of those women would be affected by the Act. *Casey*, 505 U.S. at 894. However, Justice O'Connor held that the class was narrower because it included only "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." *Id.* Therefore, this Court found that a substantial fraction of the redefined class was injured by the spousal notification provision of the Act.

In the current case, Respondents have defined the relevant class as all employees, staff, servants, officers, agents, current and future physicians, medical residents, faculty supervisors, and patients involved with abortions. Compl. ¶ 9. Respondents' interest in this case relies on a class which is broader than that found in *Casey*. Overall, the *Casey* Court had a narrow class, with a clearly defined injury, and a particularized causal link between the state

and physicians before it. *Casey* at 893. In contrast, Respondents have presented this Court with a broad class, a purely hypothetical injury, and an attenuated causal link between themselves and the Attorney General of the United States. A correct application of the *Casey* standard supports the constitutionality of the Act.

VI. ANY RULING OF UNCONSTITUTIONALITY SHOULD BE LIMITED IN SCOPE.

This Court recently stated in *Ayotte v. Planned Parenthood of Northern New England*, ___ U.S. ___, 126 S.Ct. 961 (2006) (citations omitted) that "[w]e prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact." *Id.* at 967. Three reasons were given for applying the above principle:

> First, we try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it. Third, *the touchstone for any decision about remedy is legislative intent*, for a court cannot use its remedial powers to circumvent the intent of the legislature.

Id. (citations omitted) (emphasis added).

The intent of Congress in passing the Act was to prevent the medical community from moving dangerously close to practicing infanticide. Pub. L. No. 108-105,

§ 2(14)(G), 117 Stat. 1201 (2003). It is the D & X procedure, not the D & E procedure that Congress intended to criminalize. "[I]ntact D & X is aberrant and troubling because the technique confuses the disparate role of a physician in childbirth and abortion in such a way as to blur the medical, legal, and ethical line between infanticide and abortion." *Stenberg* at 963. As Justice Kennedy noted, "States have interests including concern for the life of the unborn and 'for the partially-born,' in preserving the integrity of the medical profession, and in 'erecting a barrier to infanticide.'" *Stenberg* at 961.

It is these concerns that Congress intended to address. If this Court finds that there is unconstitutional ambiguity within the terms of the Act then only those applications that are unconstitutional should be enjoined. "Virtually all statutes have some 'conceivable' unconstitutional applications, but even the most adamant proponent of overbreadth doctrine would not suggest that these conceivable applications alone provide a sufficient basis for a statute's facial invalidation."[7] As in *Ayotte*, this Court can either remand the case for clarification by the lower court or clarify the ambiguity about D & X while maintaining the intent of Congress which is the touchstone for crafting the remedy.

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[7] Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 273 (1994) (discussing basic canon of constitutional adjudication).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the judgments of the lower courts.

Respectfully submitted,

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